UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	*Criminal No. 90-00002-P*
	)	
LARRY W. McMAHON,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On January 9, 1990 the Grand Jury indicted the defendant for possession with intent to distribute in excess of 100 marijuana plants in violation of 21 U.S.C. '' 841(a)(1) and 841(b)(1)(B). The defendant has filed a motion to suppress the fruits of a search on October 17, 1989 of his residence, garages and two trailers located on his property and incriminating statements made by him the same day. An evidentiary hearing was held before me on February 20, 1990. The last of the legal memoranda was filed on April 2, 1990. I recommend that the following findings of fact be adopted and that the motion to suppress be ***DENIED***.

I. Proposed Findings of Fact

On the somewhat dark and rainy afternoon of October 17, 1989 two special agents of the Bureau of Intergovernmental Drug Enforcement (``BIDE''), Donald Goulet and his supervisor, Kenneth Pike,[1] visited the defendant's immediate neighbors, the Bouchards, at their residence on the Falmouth Road in Windham, Maine in connection with an on-going investigation of the possible

[1] Pike is also a detective-sergeant with the Portland Police Department. T. 60, 114.

growing of marijuana by the defendant. T. 5-9.[2] The purpose of the visit was to seek the Bouchards' permission to observe the defendant's abutting property from their own. T. 7-8. They consented and Mr. Bouchard showed the agents the property line separating his property from the defendant's. *Id.* The agents then walked the property line to a point from which they could see two large tandem trailers which were located on the defendant's property about 52 feet away. T. 8-9, 47-49, II. 22-23; Deft's Exh 2. The trailers were arranged in a V-shape such that their front ends were very close together and facing the Falmouth Road and the rear doors were on the inside of the V and away from the road. T. 8-9, 39, 54; Gov't Exh. 2; Deft's Exh. 1. The agents could see electrical wires coming from the ground up into the rear of both trailers. T. 9. They were also able to see on the side of the trailer facing the Bouchard property small clothes dryer-type vents and a larger commercial restaurant-type fan covered by louvers which opened up when the fan was activated. *Id.* When the louvers opened light was visible from within the trailer and a smell emanated from the area which Agent Goulet, based on his experience and familiarity with marijuana, believed to be marijuana. T. 9-10.[3]

[2] All transcript references are to Volume I unless Volume II is specifically cited. All page references following a citation to Volume II are to Volume II exclusively.

[3] In fact, Agent Goulet had driven to the area on two previous occasions, the first on October 6th

for the purpose of locating the defendant's Falmouth Road property and the second on October 13th in an attempt to contact the Bouchards to seek the permission he received on the 17th. T. 11-12. On the first occasion Agents Goulet and Durst drove by the property a number of times along the Falmouth Road and at one point Goulet got out of his car and walked along the road. T. 20-22, 25. From the car and the road Goulet was able to observe the principal structures located on the defendant's property even though it was nighttime. T. 22-25. On the second occasion, having found that the Bouchards were not at home, he and Agent Jipson walked onto and along what they believed to be the Bouchard's property and which was confirmed to be such by Mr. Bouchard on the 17th. T. 12, 37-38, 44, 48. At that time Agent Goulet observed a couple of 50-gallon barrel drums outside and behind the nearer trailer which were not visible on the 17th. T. 12. He also more distinctly saw light coming from within the trailer. *Id.*

After these observations were made Agents Pike and Goulet met in the area with Agents Brady and Jipson and two uniformed Windham police officers and told them that Goulet and Pike were going to the Windham Police Department to meet with Assistant United States Attorney Jonathan Chapman to prepare an affidavit in an attempt to secure a search warrant. T. 13, 78-79. Since the defendant was known to be at home, the others were instructed by Agent Pike to stay in the vicinity of the defendant's property in order to make certain that no evidence was going to be destroyed. T. 13, 116. Specifically, Pike told the agents that if the defendant left his residence they were to head toward the trailers and secure them and the house until a search warrant was obtained. T. 116. Agent Pike then drove Agent Goulet to the Windham Police Department. T. 62.

In time Agent Jipson, who had positioned himself on the Bouchard's property, observed the defendant walking from one of his garages toward the trailers. T. 80. Jipson relayed this information to Agent Brady by radio. T. 81. He then approached the defendant, identified himself, drew his weapon, asked the defendant to place his hands on the side of the trailer and conducted a patdown search of his person for weapons. T. 82. Agent Pike was advised by radio call at 6:10 p.m. of the defendant's movement toward the trailer and of the fact that the agents on the scene were about to secure the trailers and the house. T. 117-118. Jipson was joined at this point by Brady and the two Windham police officers.[4] T. 83. The authorities proceeded to secure the house and both garages by conducting a security sweep of them to check for the presence of other people and to make sure the area was safe and all evidence preserved. *Id.* Officers were then posted outside the garages and the house. T. 86-87. Agents did not search for evidence during the sweep and none was found. T. 85-86. The trailers were not entered at that time or until the defendant later executed a written consent to

[4] No weapons were drawn by any of the other law enforcement officers. T. 83, 91, 113.

search. T. 86. In the meantime the defendant remained unrestrained. T. 83. In fact, Agent Jipson told the defendant that he was not under arrest, requested some identification from him and told him further that he was free to leave but could stay if he had any questions. *Id.*, II. 8, 35. The defendant followed Jipson and Brady from the trailers to the area of the house asking a lot of questions. T. 95-97. He was told that the supervising agent would be arriving and that he could wait for him. T. 96. Agent Brady too explained to the defendant that he was not under arrest and was free to leave. T. 168, II. 35. Brady also read the defendant his *Miranda* rights because of certain ``excited utterances" the defendant made. T. 169.

When Agent Pike first arrived at the scene at approximately 6:25 p.m. or soon after, he observed a marked police cruiser, the two uniformed Windham police officers standing around the general area and the defendant standing in one of his garages. T. 118, 131. The defendant remained unrestrained. T. 118. Pike approached the defendant and identified himself. T. 119. Agent Jipson told Pike in the defendant's presence that he had advised the defendant he was free to go. T. 105, II. 35. Pike concurred. T. 105, II. 9. Pike asked the defendant if he would like to speak with him. T. 119. He also stated to the defendant that he could explain to him what was going on and what the authorities were going to do. *Id.* The defendant indicated he would like to know what was going on. *Id.* Pike invited him to go over to his car, which he did.[5] *Id.*, T. 132. The defendant observed during this time the arrival of several officers and cars. T. II. 13. Agent Pike and the defendant got in the

[5] The exchange which took place in the garage consumed a minute or two of time. T. 131. The defendant testified that the conversation in the garage took 15 or 20 minutes and that during this time Pike told him the search warrant would be there any minute and suggested the defendant sign a consent-to-search form. T. II. 10-12. I do not find the defendant's testimony in this regard credible and, accordingly, discredit it.

front seat of Pike's car and Agent Brady got in the rear. T. 119. Once inside the car[6] Agent Pike explained to the defendant that the authorities had been investigating him for about a month, that they were in the process of preparing a search warrant and affidavit and that Pike would talk with him if he wanted to ask Pike any questions. *Id.* Approximately 10 minutes had now elapsed since Pike's conversation with the defendant had begun. T. 144. At that point and although the defendant was not in custody, Agent Pike proceeded to read the *Miranda* warnings to the defendant from a card ``just . . . to be safe." T. 119-121, 140. It was now 7:00 p.m. T. 135. The defendant indicated he understood his rights as explained to him and that he wanted to answer questions. T. 120-121, II. 33. The defendant also stated that he could not afford a lawyer whereupon Pike explained to him again that in such circumstances the state would appoint a lawyer for him. T. 121.

[6] The car was an unmarked vehicle equipped with a police radio located out of sight under the seat and did not otherwise have the appearance of being a law enforcement vehicle. T. 134.

The defendant asked Pike how the authorities knew what was going on at his property and why they were there. *Id.* Pike explained that they had received a tip about a month earlier indicating that the defendant was involved in growing marijuana and that agents had observed the trailers, had smelled marijuana emanating from them, had seen electrical lines and water lines going into them and had seen lights coming on and off from within them. *Id.*, T. 155-156. Pike explained that he had a consent form which he could show the defendant which would permit a search of the defendant's property without obtaining a search warrant and indicated that the authorities were looking for drugs, money and paraphernalia.[7] T. 122. He also explained that if they found any of these things they would be used against the defendant in court. *Id.* The defendant, concededly an intelligent man,[8] asked a number of questions which Agent Pike answered. T. 157, II. 28, 39-40. The defendant then expressed his concern about arrest and bail. T. 122. Believing at the time that the authorities were investigating violations of state law, Pike explained to the defendant how bail worked under state law, reminded him that he was not then under arrest, again told him that he could leave at any time[9] but also told him that once drugs were found he would be placed under arrest. T. 122-123. Pike further

[7] No discussion about a consent to search took place prior to the time Agent Pike read the defendant his *Miranda* rights. T. 149.

[8] The defendant, 42 years old, completed a two-year college course in computer science, is a licensed master electrician and displays considerable knowledge of botany and genetics. T. II. 3-4, 26-31.

[9] In this conversation which preceded the signing of the consent form, the defendant stated that he had a date that evening and was debating whether to keep it or to stick around until the authorities had completed a search of the premises. T. 125. Pike told him he could go to dinner with his girlfriend if he wished. *Id.* During the course of the discussion Pike told the defendant a number of times that he was free to go. T. 142. Pike testified that he would have let the defendant go if in fact he had wished to. T. 125. Pike also explained to the defendant that the house and trailers were secured and that if he went into the house an agent would have to accompany him to make sure he did not destroy any evidence. T. 141.

explained that if the defendant were charged he could bail himself out by taking his property deed to the Windham Police Department. *Id.*

Pike also indicated to the defendant that the same procedure covering arrest and bail would apply whether the authorities obtained a search warrant or secured the defendant's consent to search. T. 123, 153-154. He explained that, if the defendant did leave and it later turned out that there was a basis for arresting him, he would be arrested wherever he was sometime the next day, and in that event would most likely be brought to the Cumberland County Jail and would appear before a judge to be bailed rather than be bailed out of the Windham Police Station. T. 125, 151-152. So far as the status of the search warrant was concerned, Pike explained to the defendant that the authorities were in the process of preparing one and that after it was prepared a judge would have to review it and would issue a search warrant ``if there's enough there." T. 123. He specifically told the defendant that a search warrant would not be issued unless a judge approved it. *Id.*, II. 39.

At this point Agent Pike read the consent-to-search form out loud to the defendant. T. 126. He then filled in the blanks and gave the form to the defendant to read. *Id.* Pike had the defendant read a portion of the form aloud to make certain he could read. *Id.* The defendant then read the form to himself. *Id.* Having been informed of his constitutional right to refuse to consent, the defendant signed the form at 7:20 p.m. in the presence of Agent Pike. T. 124, 142-143, II. 33-34; Gov't Exh. 1. At this time Agent Pike radioed Agent Goulet, who was working with Assistant United States Attorney Jonathan Chapman on the affidavit in support of a search warrant, to tell him that the defendant had signed a consent to search his residence and certain other property. T. 14, 69, 75-76. Goulet then put the paperwork for the search warrant application aside, left the Windham Police Station and drove over to the defendant's property. T. 15, 71. When he arrived there approximately 15-20 minutes later he determined that the search had already begun. *Id.*

The defendant was arrested after he unlocked and opened the trailer doors for the authorities. T. II. 20. The search of the defendant's residence began at 8:15 p.m. T. 76. Goulet was assigned responsibility for collecting the evidence. T. 15, 72. Five hundred thirty marijuana plants, growing lights, hypodermic needles, packaged marijuana and related paraphernalia were seized from the trailers. T. 15-16. The trailers themselves were also seized. *Id.* Evidence was seized as well from the defendant's residence and the garages. T. 16-17. The defendant also made incriminating statements to Agent Pike after he was given his *Miranda* rights. T. 126-127.

During the course of the evening, including the time both before and after the defendant signed the consent-to-search form, a total of between 10 and 15 law enforcement people arrived at the scene in several vehicles some of which were parked in such a way as to effectively block all of the driveways and the defendant's means of egress had he chosen to leave by automobile. T. 67, 101-102, 112-113, II. 13. Heavy equipment also arrived to move the trailers. T. 107.

II. Legal Discussion

The defendant argues that the evidence recovered from the search of the trailers, his home and outbuildings should be suppressed because his consent to the search was not free and voluntary. He contends that the combined words and actions of the investigating agents were coercive and that, looking at the totality of the circumstances, he reasonably believed that he was in custody and had no choice but to sign the consent-to-search form.

In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Supreme Court established an objective standard for determining whether a person has been seized:

> [A] person has been ``seized'' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free

> to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person.

Id. at 554 (citations and footnotes omitted). On the subject of searches, Supreme Court cases hold ``that procedure by way of a warrant is preferred, although in a wide range of diverse situations [the Court has] recognized flexible, common-sense exceptions to this requirement." *Texas v. Brown*, 460 U.S. 730, 735 (1983) (plurality opinion); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). ``[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth*, 412 U.S. at 219. The government, however, ``has the burden of proving that the consent was, in fact, freely and voluntarily given." *Id.* at 222.

In order to determine whether the consent to search was free and voluntary the court must assess ``the totality of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226; *United States v. Watson*, 423 U.S. 411, 424-25 (1976). This examination must take into account subtly coercive police questions, as well as the youth, intelligence and the possibly vulnerable subjective state of the person who consents. *Schneckloth*, 412 U.S. at 226-27, 229. The Supreme Court has held that a defendant's consent to a search is not coerced where there is ``no overt act or threat of force against [the defendant] proved or claimed . . . [or] promises made to him or . . . indication of more subtle forms of coercion that might flaw his judgment." *United States v. Watson*, 423 U.S. at 424. In addition, a defendant's initial refusal to comply with an officer's request to search his property does not necessarily affect consent to and later compliance with additional search requests. *Davis v. United*

States, 328 U.S. 582, 593-94 (1946). Furthermore, the court may weigh any allegedly coercive statement by the authorities against the language of a written consent form in its evaluation of the circumstances surrounding the consent. *United States v. Twomey*, 884 F.2d 46, 51 (1st Cir. 1989).

The defendant argues that his case is distinguishable from those cited by the government.[10] He asserts that in *Schneckloth* the environment in which the consent was obtained was ``non threatening" and ``congenial," that in *Mendenhall* the defendant was not subject to an unlawful detention when consent was given and that in *Twomey* the parties who consented to the search were not themselves under threat of arrest. The defendant claims that he was coerced into consenting to the search because the atmosphere of the investigation left him with the impression that he had no other choice. He contends that the manner in which he was first approached by Agent Jipson, the number of police present, their initial sweep of the house and outbuildings, the circumstances and tone of his interview with Agents Pike and Brady and the constant reminder that the police were in the process of securing a search warrant and that arrest was likely created an intimidating interrogation atmosphere which vitiated the consent he gave.

[10] The defendant agrees with the government that the cases controlling this motion are *Schneckloth*, *Mendenhall* and *Twomey*. *See* Defendant's Post Suppression Hearing Memorandum at 1.

Contrary to the defendant's contentions, however, I find that the government did not engage in acts or threats of force, or make promises to the defendant or exert more subtle forms of coercion. Nor, viewing all the surrounding circumstances in their totality, can I conclude that ``a reasonable person [in the defendant's circumstances] would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554. The patdown search conducted by Agent Jipson with a drawn weapon took but a minute and was separated in time from the defendant's consent to search by at least 1 hour 20 minutes and numerous intervening events. Moreover, the defendant, a mature individual with above-average intelligence, was told several times by three different agents that he was not under arrest and that he was free to leave,[11] although on at least one occasion it was explained to him that if incriminating evidence was found he would be arrested. He was also told that he could refuse to consent to the search and of the steps already undertaken and contemplated by the authorities in connection with their efforts to secure a search warrant. This account, including the explanation that a warrant would not be issued unless a judge approved it, was accurate in all material respects. In addition, the defendant's interview with the two agents in Agent Pike's car did not carry the indicia of an arrest or official interrogation. The plaintiff was seated in the front seat of an ordinary-looking

[11] The defendant also claims that he did not feel he could leave because his car ``was probably blocked in by various police cars." Defendant's Post Suppression Hearing Memorandum at 8. The Court of Appeals for the First Circuit has held that simply leaving cars parked in such a way that a defendant is unable to move his car does not necessarily create an ``arrest-like restraint." *United States v. Quinn*, 815 F.2d 153, 156 (1st Cir. 1987). Rather, the test is ``how a reasonable man in the [defendant's] position would have understood his situation." *Id.* at 157. Although at some point during the evening the driveways to the defendant's property became blocked by vehicles driven by late-arriving law enforcement officers, a reasonable man in the same circumstances, having been repeatedly told that he was free to leave, would have understood he could leave and that other vehicles would have been moved as necessary to permit him to do so. Moreover, the defendant's own pondering in the presence of Agents Pike and Brady as to whether he should leave in order to keep a dinner date with his girlfriend or stay in order to observe the unfolding events at his residence makes clear that he understood full well he was free to leave. Accordingly, I conclude that the placement of cars in the defendant's driveways was not ``tantamount to placing him under arrest." *Id.*

vehicle with one plain clothes officer beside him and a second in the back. He asked Agent Pike several probing questions indicating that he knew and understood his rights, the events which were taking place and the consequence of consenting to a search. Finally, the defendant was presented with a written consent form, which was read out loud to him and which he also read to himself, informing him of his right to refuse such consent and that anything found in the search could be used against him. *See Twomey*, 884 F.2d at 51.

On the basis of the foregoing, I conclude that the defendant knowingly, willingly and voluntarily consented to the search of the house, outbuildings and trailers and accordingly recommend that the defendant's motion to suppress be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 6th day of April, 1990.

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David M. Cohen
United States Magistrate